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Supreme Court, U.S.
FILED
NOV 12 2004
OFFICE OF THE CLERK

No. 04-500

IN THE

Supreme Court of the United States

BENNETT LEVIN,

Petitioner,

v.

UPPER MAKEFIELD TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA; ROSE MARIE SAUTER; CONRAD BALDWIN; WILLIAM GUNSER; EDWARD X. FORD; JOHN TITTERTON; LAWRENCE SALTZMAN; JOHN WALSH; BARBARA HIRST; ROBERT GORRING; ERIC FISCHER; MICHAEL FRANK; STEVEN HARRIS, ESQUIRE; GREGORY STURN, ESQUIRE; HARRIS & HARRIS, ATTORNEYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit Court of Appeals correctly applied the "shocks the conscience" standard to analyze a substantive due process claim brought pursuant to 42 U.S.C. § 1983 arising from a zoning dispute.

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INTRODUCTION

Respondents Upper Makefield Township, Bucks County, Pennsylvania, Rose Marie Sauter, Conrad Baldwin, William Gunser, Edward X. Ford, John Titterton, Lawrence Saltzman, John Walsh, Barbara Hirst, Robert Gorring, Eric Fisher, Michael Frank, Steven Harris, Esquire, Gregory Sturn, Esquire, and Harris & Harris, Attorneys (collectively referred to herein as "Respondents") respectfully request that this Court deny Petitioner Bennett Levin's Petition for a Writ of Certiorari.

Petitioner is under the misimpression that every action of a municipality to which he takes offense gives rise to a claim for deprivation of due process under 42 U.S.C. § 1983 ("Section 1983"). This Court has clearly stated that this is not so, and that "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). In order to support a due process claim, the conduct complained of must "shock the conscience." *Id.* at 846. Only conduct intended to injure and unjustified by a legitimate government interest will rise to a conscience-shocking level. *Id.* at 849. This analysis applies equally as the conceptual framework for all substantive due process claims, including zoning claims like the one at Bar. *See, e.g., City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003); *United Artists v. Township of Warrington*, 316 F.3d 392, 401-02 (3d Cir. 2003).

Further, if, as Petitioner suggests, differing theoretical constructs should apply to different types of substantive due process claims, the jurisprudence surrounding these claims will be perpetually uncertain and muddied and the federal courts would be transformed into super zoning boards. The application of *Lewis* to all substantive due process claims under Section 1983 is dictated by the case's plain language, and provides much needed consistency to due process claims such as those raised by Petitioner. The fact that Petitioner was unable to present evidence that met the constitutional standard imposed by *Lewis* is not sufficient reason to revisit the well-considered theoretical construct that case set forth.

In an attempt to further confuse the issue, Petitioner cites to numerous pre-*Lewis* and pre-*City of Cuyahoga Falls* cases in support of the proposition that the Circuit Courts remain split as to the standard of review applicable to a substantive due process claim in the land-use context. Given this Court's exhaustive analysis of the contours of a Section 1983 action in *Lewis*, the fact that there may have been different standards applied prior to that case is of no moment. Indeed, *Lewis* settled the question and *City of Cuyahoga Falls* made clear that *Lewis* applies in a land-use context. Further, since *Lewis*, the Circuit Courts enjoy far more uniformity in their approach to substantive due process claims than Petitioner would like to suggest. Indeed, the cases reveal a uniform commitment on the part of the Circuit Courts to engage in circumspect review of substantive due process claims and to limit the application of the substantive due process doctrine to only the most extreme and egregious of cases. Such commitment on the part of the Circuit Courts also demonstrates a consonant recognition of the distinction between those cases properly resolved under state law, and those cases egregious enough to create a federal due process violation.

STATEMENT OF THE CASE

In June 1997, Petitioner purchased approximately seven acres of undeveloped land (the "Property") in Upper Makefield Township (the "Township") situated between the Delaware River and the Delaware Division of the Pennsylvania Canal. (App. 35.)[1] The Property is located in a flood plain. (App. 2.) Petitioner knew at the time he purchased the Property that the prior owner had sought a zoning variance from the Zoning Hearing Board ("ZHB") in order to develop the Property and that the variance had been denied. (App. 35; App. 3.)

Before he purchased the Property, Petitioner claims that Township Code Enforcement Officer David Kuhns ("Kuhns") informed him that there was no Township policy against development of the Property. Kuhns allegedly told Petitioner that

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1 Citations to Petitioner's Appendix, containing the opinions of the United States Court of Appeals for the Third Circuit and The United States District Court for The Eastern District of Pennsylvania, shall be to "App. ____."

he would need to comply with the Township's Joint Municipal Zoning Ordinance ("JMZO"). (App. 3.)

In particular, Petitioner had to comply with three zoning requirements in order to obtain the variance he sought, including (1) the criteria set forth in the specific Zoning District; (2) the criteria contained in the floodplain overlay (Section 905); and (3) the five-pronged test set forth in Section 10910.2 of the Municipalities Plan Code ("MPC") and incorporated into the JMZO.[2] With respect to the JMZO, it not only addresses the criteria for the "CM – Conservation Management" Zoning District, in which the Property lies, but it also contains a Floodplain District overlay – Section 905 – which applies to every property located in a floodplain and contains additional criteria which must be met in addition to the requirements in other normal zoning districts. (App. 3.)

The purpose of Section 905 is "to prevent the loss of property and life, the creation of health and safety hazards, the disruption of commercial and government services, the extraordinary and unnecessary expenditure of public funds for flood protection and relief, and the impairment of the tax base." (App. 3-4.) Section 905 itemizes a number of considerations the ZHB must consider when deciding whether to grant a variance application for construction in the floodplain. Among the many considerations outlined are the following relevant portions:

- The danger to life and property due to increased flood heights or velocities caused by encroachments. No special exception or variance shall be granted for any proposed use, activity, or development that will cause any increase in the one hundred (100) year flood levels in the Floodplain District as delineated in the Flood Insurance Study referenced in Section 905.III.A.1.

- The safety of access to the property by ordinary and emergency vehicles in times of flood.

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2 Petitioner does not dispute the recitation of the applicable zoning requirements set forth in the Third Circuit's opinion.

(App. 4.)

In addition to the criteria for obtaining a variance set forth in Section 905, the JMZO also requires that "variances shall be in accordance with the provisions of the Pennsylvania Municipalities Planning Code." (App. 4.) In deciding whether to grant a variance, Section 10910.1 of the MPC provides:

> The board may grant a variance, provided that all of the following findings are made where relevant in a given case:
>
> (1) That there are unique physical circumstances or conditions . . . peculiar to the particular property . . .
>
> (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance . . .
>
> (3) That such unnecessary hardship has not been created by the appellant.
>
> (4) That the variance, if authorized, . . . [would not] be detrimental to the public welfare.
>
> (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

53 P.S. § 10910.2. These requirements are mandated by state law and the JMZO. (App. 4-5.)

On November 24, 1997, Petitioner submitted a zoning variance application and requested a hearing before the ZHB. (App. 36.) The Township Board of Supervisors held a public meeting on December 17, 1997 to discuss the application and authorized the Township solicitor to oppose the application before the ZHB. (App. 36-37.) The Township Board of Supervisors took up the application again at its January 21, 1998 meeting, and again authorized the Township solicitor to oppose the application. (App. 8.) The Township Board of Supervisors expressed concerns about health and safety in reaching its decision. (App. 37.)

The ZHB conducted eight evidentiary hearings on the application, at which both Petitioner and Township presented evidence. (App. 8.) Petitioner presented evidence as to his compliance with Section 905. (App. 8.) In response, the Township presented evidence at the hearings with respect to the health and safety risks associated with Petitioner's requested variance. (App. 8-9.) Although Petitioner was never able to present evidence to prove it, he later claimed that the ZHB had engaged in improper *ex parte* communications during the hearing process. (App. 20-21.) On July 30, 1998, the ZHB voted unanimously to deny Petitioner's application. (App. 10.)

As is his right under Pennsylvania law, Petitioner filed an appeal of the ZHB determination with the Court of Common Pleas of Bucks County, Pennsylvania. The Township intervened in that action to oppose the appeal. (App. 10.) The Court of Common Pleas reversed the ZHB determination and the Pennsylvania Commonwealth Court affirmed the decision of the Common Pleas Court. (App. 10.) The Township then sought allocatur from the Pennsylvania Supreme Court which was denied on November 9, 2000 without opinion. (App. 10.) Petitioner, therefore, has obtained complete relief from the Pennsylvania state courts and was successful in obtaining his variance to permit the development of the Property.

While the state court proceedings were pending, Petitioner applied for a foundation permit at the Property. The issuance of the permit was stayed until resolution of the then pending appeals. (App. 24.) The building permit was issued in February 2002, one week after Petitioner paid the building permit fee. (App. 24.)

Also while the state court proceedings were pending, Petitioner filed this action against the Township, the Board of Supervisors, the ZHB members and the Township solicitors in the United States District Court for the Eastern District of Pennsylvania. (App. 10-11.) Pertinent to the instant Petition for Certiorari, Petitioner claimed that the Township, the Board of Supervisors, the ZHB members and the Township solicitors violated his substantive due process rights pursuant to Section 1983. (App. 11.) The District

Court granted summary judgment in favor of defendants on February 25, 2003. (App. 12.)

Petitioner appealed to the United States Court of Appeals for the Third Circuit. On March 8, 2004, the Third Circuit Court affirmed the grant of summary judgment. In doing so, the Third Circuit Court expressly adopted this Court's holding in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and imposed a "shocks the conscience" standard to Petitioner's claims. In particular, the Third Circuit Court held that none of the actions taken by Respondents could be deemed to have met this standard. In fact, the court concluded that 1) the representations made by Kuhns were accurate; 2) the stated health and safety concerns of the Board of Supervisors were legitimate and, "on this record, the township's acquiescence to such building would have been shocking;"[3] 3) the Board of Supervisors would have been "derelict" had they not voted to oppose the application given the health and safety concerns; 4) Petitioner did not present evidence to show that the ZHB engaged in improper *ex parte* communications; and 5) the delay in issuing the permit was at most a "tale of overbearing conduct," and not conduct that shocked the conscience. (App. 17-25.)[4]

REASONS FOR DENYING THE PETITION

A. The Standard Set Forth In *County Of Sacramento v. Lewis* Provides The Theoretical Construct For All Section 1983 Substantive Due Process Claims, Including Zoning Claims, And There Is Therefore No Split In The Circuits That Must Be Addressed.

Petitioner's assertion that there is a split in the Circuits with respect to the appropriate standard to apply to a Section 1983 case arising from the actions of a zoning board ignores the clear pronouncements of this Court in *County of Sacramento v. Lewis*,

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3 Indeed, the emergency access roads and a portion of the Property flooded during this past Fall's hurricane season.

4 Interestingly, for all of his complaint regarding delay, after receiving the building permit in February 2002, Petitioner still has not commenced construction of his house at the Property. (App. 11.)

523 U.S. 833 (1998) and *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003). Given that this Court has adopted the *Lewis* standard in *City of Cuyahoga Falls*, a land-use case, there is no credible argument that certiorari should be granted to address a supposed Circuit split prior to the *City of Cuyahoga Falls* opinion. Tellingly, however, Petitioner does not even cite the *City of Cuyahoga Falls* case in his Petition. Thus, it is irrelevant that the Circuit Courts used somewhat different language in defining the type of conduct that rises to the level of a substantive due process claim in a land-use case prior to the *City of Cuyahoga Falls* case because that case has definitively settled the issue.

In *Lewis*, the Court determined that, in order to provide the basis for a Section 1983 action, the state action at issue must have been arbitrary and capricious to such a degree that it shocks the conscience. *Lewis*, 523 U.S. at 846-47. In that case, a police officer engaged in a high speed pursuit of a motorcycle which caused the death of the motorcycle passenger. The Court held that in those circumstances, "only a purpose to cause death unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Id.*

As this Court explained in *Lewis*, due process is meant to protect against arbitrary government action. *Id.* at 845-46. In cases dealing with executive action. the Court has ruled that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id. (quoting Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)). The Court also noted that it has found due process violations since 1952 only where "the cognizable level of executive abuse of power . . . [is] . . . that which shocks the conscience." *Id.* at 846-47 *(citing Rochin v. California*, 342 U.S. 165, 172-73 (1952); *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957); *Whitley v. Albers*, 475 U.S. 312, 327 (1986); *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Collins*, 503 U.S. at 128). Thus, as the Court explained in *Lewis*, it is well-established that an action by the government will not be deemed to be arbitrary in a constitutional sense unless it rises to the level of shocking the conscience.

The *Lewis* standard is not rigid and provides the courts with the flexibility to evaluate the factual circumstances in which the challenged action occurred. Indeed, whether a particular action "shocks the conscience" will be largely dependent on the facts and context in which the action was taken. *United Artists v. Township of Warrington*, 316 F.3d 392, 399-400 (3d Cir. 2003). Thus, "deliberate indifference that shocks the conscience in one environment may not be so patently egregious in another, and . . . [the] . . . concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." *Lewis*, 523 U.S. at 850.

Petitioner's real complaint appears to be that he does not like the legal determination that the relatively benign facts he presented to the District Court simply do not rise to the level of a due process violation. Petitioner complains that under the "shocks the conscience" standard, plaintiffs will not be able to obtain redress for improper actions of zoning boards and that zoning boards will therefore have "*carte blanche* to infringe upon property rights." (Petition for Certiorari at 9.) Melodrama aside, Petitioner fails to appreciate that not all improper actions rise to the level of constitutional violations. Indeed, this Court clearly recognized that a plaintiff must meet a high bar in order to show a constitutional violation: "It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly points toward it, only at the ends of the tort law's spectrum of culpability." *Lewis*, 523 U.S. at 848. Thus, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849. Petitioner simply did not meet his burden of proof to show that the Respondents behaved in a manner that would shock the conscience. Not every misdeed results in a due process violation.

If there was any doubt as to the breadth of *Lewis* and the principles expressed in that case, this Court laid it to rest in *City of Cuyahoga Falls*. In *City of Cuyahoga Falls*, the city submitted a

facially neutral referendum on the ballot calling for the repeal of a municipal housing ordinance which the plaintiffs claimed was a violation of the Equal Protection Clause, the Due Process Clause and the Fair Housing Act. 538 U.S. at 191. While the formal petition for a referendum was pending before the City, the city engineer denied the plaintiffs' permit request, which the plaintiffs claimed was a substantive due process violation. *Id.* at 192. Reversing the Sixth Circuit Court of Appeals that had found a constitutional violation, this Court held that the "city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct." *Id.* at 198. In support of this holding, the Court cited *Lewis* and the extensive analysis of the contours of due process contained in that opinion. *Id.* This Court, therefore, has already applied the *Lewis* analysis and standard to a determination of whether or not a zoning action taken by a municipality violated the Due Process clause, and, if there ever was any question of the applicability of *Lewis* to such cases, this Court has definitively resolved any lingering confusion. Despite the clear import of this decision, Petitioner did not even cite it to this Court in his Petition.

Petitioner's claim that there is a split in the Circuits as to the proper standard to be applied when assessing a due process violation in the zoning context disregards *Lewis* and completely ignores this Court's holding in *City of Cuyahoga Falls*. Indeed, in support of his position that there is a split in the Circuits, Petitioner cites to twelve cases that were decided before *Lewis*. The seven post-*Lewis* cases cited by Petitioner were decided prior to the *City of Cuyahoga Falls* case, and therefore do not take into consideration the import of that case. Since the *City of Cuyahoga Falls* case was decided by this Court, no Circuit Court has held that any test other than shocks the conscience should be used in a land-use due process case. Now that this Court has reiterated that the *Lewis* standard applies in the land-use context, the argument that there is a split in the Circuits prior to the *City of Cuyahoga Falls* case on this issue is irrelevant.

B. Since This Court's Opinion in *City of Sacramento v. Lewis*, the Circuit Courts Have Consistently Demonstrated A Commitment To An Extremely Restrictive Application of Substantive Due Process Analysis in the Land-use Context.

Petitioner cannot successfully argue that there is any split in the Circuits after this Court's ruling in *Lewis*. Indeed, it is readily apparent that the Circuit Courts enjoy far more uniformity in their approach to substantive due process claims than Petitioner suggests. Only the most egregious conduct can result in a substantive due process violation.

Prior to *Lewis*, there was some confusion as to the proper standard to be applied to substantive due process claims under Section 1983. In the Third Circuit, the Court had applied a very liberal standard to such claims prior to *Lewis*, finding a violation of substantive due process where the state action was "arbitrary, irrational, or tainted by improper motive." *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988). The Third Circuit Court, however, revisted this standard in light of *Lewis* and overruled the prior case law that had applied it. *United Artists v. Township of Warrington*, 316 F.3d 392, 394 (3d Cir. 2003). In *United Artists*, the Third Circuit Court noted that the *Bello* test "cannot be reconciled with *Lewis's* explanation of substantive due process analysis . . . The 'shocks the conscience' standard encompasses 'only the most egregious official conduct.'" *Id.* at 400 (*citing Lewis*, 523 U.S. at 846). The *United Artists* Court concluded that there was "no reason why the present case should be exempted from the *Lewis* shocks-the-conscience test simply because the case concerns a land use dispute." *Id.* at 401.

Critical to the *United Artists* Court's decision was the Court's unwillingness to take on the role of a "zoning board of appeals." *Id.* at 402. Noting that "every appeal by a disappointed developer from an adverse ruling of a local planning board involves some claim of abuse of legal authority," the *United Artists* Court stated that "[l]and-use decisions are matters of local concern and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives." *Id.*

Although Petitioner would have the Court believe that there is a split in the Circuits on the applicability of *Lewis* to land-use cases, this is not the case. Indeed, the post-*Lewis* cases that Petitioner cites are in accord with the *United Artists* Court in requiring extreme conduct before finding a due process violation, and in resisting the invitation to become "super zoning boards."

Further, although Petitioner cites extensively to *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) to support his argument that there is confusion in the Circuits as to the proper standard to be applied in land-use cases, Petitioner fails to acknowledge that *City of Cuyahoga Falls*, also arising from the Sixth Circuit, overrules *Pearson* to the extent it conflicts with *Lewis*.[5] In *City of Cuyahoga Falls*, the Sixth Circuit had applied a "rational basis" test to evaluate the legislative conduct of the City, and found that the plaintiffs had presented sufficient evidence to prevail on summary judgment on the substantive due process claim. *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 643-44 (6th Cir. 2001), *rev'd in part, vacated in part*, 538 U.S. 188 (2003). This Court, however, expressly rejected this analysis in favor of the *Lewis* standard, stating that "[w]e need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct." *City of Cuyahoga Falls*, 538 U.S. at 198 (*citing Lewis*, 523 U.S. at 846). Thus, to the extent that *Pearson* is inconsistent with *Lewis*, this Court made clear that *Lewis* controls.

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5 In *Pearson*, the Sixth Circuit Court adopted the rational basis standard only for land-use decisions it characterized as legislative. *Pearson*, 961 F.2d at 1223. With respect to land-use decisions it characterized as administrative, the *Pearson* Court adopted the "shocks the conscience" standard. *Id.* at 1222. In support of its decision to adopt the "shocks the conscience" standard, the Court found the standard "emphasize[d] the degree of arbitrariness required to set aside a zoning decision by a local authority – – and . . . underscore[d] the overriding precept that 'arbitrary and capricious' in the federal substantive due process context means something far different than in state administrative law." *Id.*

In the post-*Lewis* era, other Circuits have recognized the extremely circumspect nature of substantive due process review. *See, e.g., Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999)(finding substantive due process violated only where governmental conduct qualifies as outrageously arbitrary); *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002)(finding a substantive due process claim supported only where conduct "fall[s] beyond the outer limits of legitimate governmental action"); *Simi Inv. Co. v. Harris County, Tex.*, 236 F.3d 240, 249 (5th Cir. 2000)(finding substantive due process analysis appropriate in only those cases where the government arbitrarily abuses its power); *Crider v. Board of County Comm'rs of Boulder*, 246 F.3d 1285, 1289 (10th Cir. 2001)(finding that substantive due process requires more than simply erroneous behavior on the part of the government); *Garvie v. City of Fort Walton Beach*, 366 F.3d 1186, 1191 (11th Cir. 2004)(finding that conduct "by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense")(internal citations omitted); *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003)(finding that due process constrains only egregious government misconduct). Indeed, the dearth of decisions finding a substantive due process violation in the land-use context highlights the commitment to circumspect review on the part of the Circuit Courts.

In fact, a review of the post-*Lewis* cases cited by Petitioner reveals that only in one instance did a court find the degree of egregiousness necessary to support the plaintiff's substantive due process claim. Even then, the Fifth Circuit Court limited its holding to cases involving "blatant governmental interference with property rights" and emphasized the "particularly odd fact situation . . . [and] the length and degree of governmental abuse" present in the case before it. *Simi Investment*, 236 F.3d at 249 (finding that county's use of a non-existent park to interfere with private property interests represented arbitrary and capricious governmental action). More typically, the Circuit Courts routinely find the facts lacking the egregiousness necessary to support a substantive due process claim. *See, e.g., Iowa Coal Mining Co., Inc. v. Monroe County*, 257

F.3d 846, 853 (8th Cir. 2001)(finding that government's seemingly intentional nineteen-month delay in deciding on plaintiff's land use application failed to qualify as "truly irrational" conduct).

By whatever words, the Circuit Courts have echoed this Court's holding in *Lewis* that only conduct that "shocks the conscience" qualifies as sufficiently arbitrary and capricious. This concept is not a new one. Indeed, as the *Natale* Court recognized, using the "shocks the conscience" standard to determine whether the government acted in an arbitrary and capricious manner has long enjoyed acceptance in the substantive due process arena. *See, e.g., Natale,* 170 F.3d at 262-63. Likewise, the Sixth Circuit has recognized the arbitrary and capricious standard as "simply another formulation of, but no less stringent than, the more traditional 'shocks the conscience' standard." *Bowers v. The City of Flint,* 325 F.3d 758, 763 (6th Cir. 2003)(rejecting plaintiffs' argument that the city had violated their substantive due process rights when it failed to give a five-percent discount to those persons who paid their bills on time). Although the *Bowers* decision involved state-created contractual rights rather than zoning ordinances, the underlying principle of substantive due process analysis remains the same. Those issues capable of redress in state-based actions are not proper subjects for federal protection under the doctrine of substantive due process. *Id.* at 763-64.

The Circuit Courts' recognition that only the most egregious of governmental conduct invokes constitutional protection represents a commitment in federal jurisprudence to leave to the states that which properly belongs before the states.[6] Indeed, the post-*Lewis* cases cited by Petitioner underscore the tremendous importance that

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6 Petitioner cites to a law review article in support of his contention that "shocks the conscious" acts as a virtual bar to substantive due process actions. (Petition for Certiorari at 10.) In that article, the author advocated the adoption of the "shocks the conscience" standard by the Washington Supreme Court. The author did so because he argued that the adoption of the standard would bring Washington state "into step with federal case law and preserve the fundamental distinction between issues that should be resolved under state law and misconduct which is egregious enough to implicate an individual's federal constitutional rights." Eric Jenkins, *Challenging Land Use Actions Under Section 1983,* 74 Wash. L. Rev. 853, 880 (1999).

the Circuit Courts have placed on the distinction between those issues deserving resolution under state law and those issues involving misconduct egregious enough to implicate an individual's constitutional rights. *See Natale*, 170 F.3d at 262 ("arbitrary conduct that might violate zoning regulations as a matter of state law is not sufficient to demonstrate conduct so outrageously arbitrary as to constitute a gross abuse of governmental authority that will offend the substantive component of the Due Process Clause"); *Tri-County Paving*, 281 F.3d at 441 (finding existence of substantive due process claim belied where state courts are available for redress). The Circuit Courts' insistence on maintaining this state law/federal due process law distinction represents a recognition by the Circuit Courts of the inherent danger in qualifying actions that merely violate state law as arbitrary or irrational for purposes of due process analysis.

Regardless of the words used to describe the standard applied, Petitioner failed as a matter of law to show facts sufficient to establish a substantive due process violation. The conduct about which he complains was described by the Third Circuit Court to have been actions taken to meet the Board of Supervisor's "legitimate concerns" regarding health and safety. (App. 18-19.) The Third Circuit further found that Petitioner did not present sufficient evidence to support his claim of improper *ex parte* conduct. (App. 20-22.) Finally, with respect to the delay in the issuance of the building permit, the Third Circuit Court noted that "[a]t most, [Petitioner] tells a tale of overbearing conduct by a Township employee." (App. 25.) Petitioner would not have been able to show a substantive due process violation under any of the post-*Lewis* cases he relies on in support of his Petition.

The principles articulated in *Lewis* and in *City of Cuyahoga Falls* further clarified long-standing tenets of substantive due process analysis. Specifically, *Lewis* and *City of Cuyahoga Falls* affirmed the movement in federal jurisprudence towards the restriction of the use of substantive due process as a means to expand federal oversight of matters within the purview of the states. Although Petitioner attempts to create the appearance of a split amongst the Circuits, as demonstrated, the Circuit Courts have

remained united in their highly restrictive application of substantive due process analysis in the land-use context.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: November 15, 2004